IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN & FOREIGN INSURANCE CO., and ROYAL INSURANCE COMPANY OF AMERICA, INC.	:	**CIVIL ACTION**
v.	:	
PHOENIX PETROLEUM CO.	:	**No. 97-3349**

Norma L. Shapiro, J. **December 22, 1998**

MEMORANDUM AND ORDER

Plaintiff Royal Insurance Co. ("Royal") seeks reconsideration of the court's finding that plaintiff Royal was required to defend Phoenix Petroleum Co. ("Phoenix") in a suit arising from activities in a joint venture that Royal argued were not covered by its insurance policy ("the policy"). For the reasons stated below, Royal's motion will be denied.

BACKGROUND

American & Foreign Insurance Co. ("American") and Royal Insurance Co. ("Royal") sought a declaratory judgment that Phoenix Petroleum Co.'s ("Phoenix") activities in a joint venture were not covered by their insurance policies, and that there was no concomitant duty to defend or indemnify. The Court granted American's motion for summary judgment, and held a non-jury trial on Royal's claims. In accordance with Federal Rule of Civil Procedure 52(a), the court entered findings of fact and conclusions of law on June 23, 1998. Phoenix purchased insurance

from both American and Royal for the period 1996 to 1997; American issued a commercial general liability policy ("general liability policy"), and Royal issued a commercial catastrophe liability insurance policy ("umbrella policy").

American's primary policy contained a "Who is an Insured" section providing:

> No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

(Pl. Ex. 3, Section II, p. 7).

Phoenix Petroleum is the only Named Insured in the general liability policy declarations; no joint venture is mentioned.

Royal's umbrella policy provided excess coverage for any claims against any insured "in any of the policies listed in Item VI Schedule of Underlying Insurance," (Pl. Ex. 4, endorsement 1). Three policies are listed: the general liability policy, an automotive liability policy issued by "Royal", and a workers compensation and employers liability policy issued by "Selective." (Pl. Ex. 4, p. 2).[1] The form umbrella policy defined insured parties[2] under Section III, and did not limit coverage to parties covered under the general liability policy.

[1]The parties provided the court with the umbrella policy and the general liability policy, but did not provide the court with the automotive liability policy, or the workers compensation and employers liability policy for the policy year at issue.

[2]The umbrella policy stated that Phoenix was a corporation. In the insurance application, the box for corporation was checked; there was a box for joint venture, but it was not checked.

Section III of the umbrella policy was deleted and replaced with a concurrent endorsement stating:

> If you are designated as an insured in [the general liability policy, the automotive liability policy, or the workers compensation and employers liability policy] you are also an insured under this policy.
>
> If you are not an Insured in any of the[se] policies . . . you are not an Insured under this policy.

The umbrella policy provided coverage for covered property damage.[3]

In 1992, Phoenix and International Petroleum Company ("IPCO") had entered into a joint venture ("the joint venture") to manufacture and market lubricating oils. Phoenix purchased base lubricating oil which it blended and compounded into

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[3] "Property damage" is defined as:

> physical injury to tangible property, including all resulting loss of use of that property, or [] loss of use of tangible property that is not physically injured.

The umbrella policy excludes coverage for:

> "Property Damage" to "Impaired Property" or property that has not been physically injured, arising out of:
>
> (a) A defect, deficiency, inadequacy or dangerous condition in "Your Product" or "Your Work"; or
>
> (b) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms,
>
> This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "Your Product" or "Your Work" after it has been put to its intended use.

"Impaired Property" is defined in the umbrella policy as:

> tangible property, other than "Your Product" or "Your Work" that cannot be used or is less useful because:
>
> (a) it incorporates "Your Product" or "Your Work" that is known or thought to be defective, deficient, inadequate, or dangerous; or
>
> (b) You have failed to fulfill the terms of a contract or agreement;
>
> if such property can be restored to use by:
>
> (a) The repair, replacement, adjustment or removal of "Your Product" or "Your Work"; or
>
> (b) Your fulfilling the terms of such contract or agreement.

finished lubricating oils sold by the joint venture under invoices bearing both companies' names; profits were divided equally.

In July, 1996, the joint venture sold some of these blended lubricating oils to Horn Brothers Oil Company, Inc. ("Horn Brothers"), who resold the product to their customers. Horn Brothers refused to pay amounts allegedly due. The joint venture sued to collect amounts owed; Horn Brothers, alleging that the oils were defective, counterclaimed for: direct and indirect loss of profits, damage to equipment, loss of use of equipment, economic damages including costs associated with recovering, replacing, storing and disposing of the defective oils, and repair and restitution for its customers' damages. Horn Brothers was exclusively a customer of the joint venture, it did not purchase products from Phoenix individually.

Phoenix notified American and Royal of their duty to defend and indemnify. American and Royal both disclaimed coverage on the ground that the joint venture was not covered by the general liability policy or umbrella policy, respectively. In its complaint, Phoenix stated that it did not challenge declination of coverage under the General liability policy; it sought coverage under the umbrella policy.

The court granted summary judgment on behalf of American; the joint venture is not covered by the general liability policy.

The court denied summary judgment on behalf of Royal because the "motion . . . turn[ed], in part, on whether the joint venture enjoys legal status independent from that of Phoenix, and could be independently insured." (Order, April 29, 1998, ¶ 3). The court held a non-jury trial on Royal's claims, and entered findings of fact and conclusions of law on determining that Royal had not met its burden of establishing that Phoenix was not an insured under any of the policies underlying the umbrella policy. Before the court is Royal's timely motion for reconsideration.

Discussion

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171 (1986). "Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly." Continental Casualty Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995).

Courts will reconsider an issue only "when there has been an intervening change in the controlling law, when new evidence has become available, or when there is a need to correct a clear error or prevent manifest injustice." NL Industries, Inc. v. Commercial Union Ins. Co., 65 F.3d 314, 324 n.8 (3d Cir. 1995);

Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D. Pa. 1994). "A motion for reconsideration is ... not properly grounded on a request that a court rethink a decision it has already made." Tobin v. General Elec. Co., 1998 WL 31875, at *1 (E.D. Pa. Jan. 27, 1998).

Royal argues the court reached an issue not properly before it and that it improperly placed the burden of proof on the insurer, Royal.

Royal's first asserted basis for reconsideration is that the coverage of underlying policies was not properly before the court as Phoenix failed to deny lack of coverage in its answer or raise coverage affirmatively at any later stage in the proceedings. Royal correctly states that the failure to deny allegations in the complaint to which a response is required acts as an admission. 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1279 (2d ed. 1990). A denial may not be a "passing reference" but rather "must meet the substance of the averments denied." Id.

Royal alleged, in Count I of its complaint, that: 1) joint ventures that are not named insureds are not covered under the general liability policy (Compl. ¶ 17); 2) the joint venture asserted in the counterclaim was not a named insured in the general liability policy (Id. ¶ 18); and 3) any liability of Phoenix arising from the joint venture was not covered by any

American policy. (Id. ¶ 19). In its answer and counterclaim, Phoenix responded that: 1) "[t]he insurance contract speaks for itself and any contrary characterization is denied" (Ans. ¶ 17); 2) the "counterclaim speaks by itself and any contrary characterization is denied" (Id. ¶ 18); and 3) "[d]enied as a conclusion of law." (Ans. ¶ 19). These answers are not "passing references" but state Phoenix's position that the policy language provides coverage for the joint venture under one of the policies underlying the umbrella policy. These responses are sufficient and do not constitute failures to deny; the question of whether the joint venture was an insured was properly before the court.

Traditionally, the party who affirmatively raises an issue bears the burden of proof at trial. Liberty Mutual Ins. Co. v. Sweeney, 216 F.2d 209, 210-11 (3d Cir. 1954)(quoting Moore's Federal Practice § 57.31(2)(1953)). But when an insurer seeks, in advance of litigation, a declaratory judgment that a particular occurrence is not covered under an insurance policy, the burden of proof does not always lie with the insurer. Although the insurer is the plaintiff in such actions, this fact alone will not determine where the burden of proof should fall. See Fireman's Fund Insurance Co. v. Videfreeze Corp., 540 F.2d 1171, 1174 (3d Cir. 1976), cert. denied, 429 U.S. 1053 (1977). In determining the "often elusive issue as to which party in a declaratory judgment bears the burden of proof," id., four

factors should be considered: "1) whether the plaintiff objected to assuming the burden of proof; 2) which party asserted the affirmative of the issue; 3) which party would lose in the absence of any evidence on the issue; 4) what sort of relief is sought." Id. at 1175.

The latter three elements point towards placing the burden on Phoenix as the party seeking to prove coverage in the affirmative; they have asserted both rights to coverage and damages in their counterclaim against Royal. See id. at 1175-76. However, the first element of this analysis, whether plaintiff objected to assuming the burden of proof, controls this court's decision. A plaintiff who shoulders the burden by filing an action should not spring the burden on an unsuspecting defendant. See id. In this case, Royal first objected to bearing the burden of proof in its motion for reconsideration. The issue was not raised by Royal in its complaint, answer to the counterclaim, pre-trial memorandum, or at trial. Counsel for Royal proceeded with its case as a plaintiff and presented its opening statement and evidence before Phoenix. At the close of Royal's case, Phoenix moved for a judgment on partial findings under Fed. R. Civ. P. 52(c). Neither then nor at any other point during these proceedings did Royal claim the burden of proof was on Phoenix.

It is "but common sense" that plaintiff may not seek to discard the burden it previously donned without protest. Liberty

Mutual, 216 F.2d at 210-11. See also Nationwide Mutual Ins. Co. v. Diehl, 768 F. Supp. 140, 142 n.3 (E.D. Pa. 1990)("Inasmuch as Nationwide initiated this action to obtain declaration of non-coverage, accepted the burden of going forward, and did not argue the issue until raised sua sponte after trial, it retained the burden of proof."). Although Royal might have successfully argued for shifting the burden, it has waived that argument. 10B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2770 (3d ed. 1998).

In claiming that the insured defendant who seeks coverage should usually bear the burden of proof, Royal relies on Fireman's Fund, 540 F.2d at 1175. In Fireman's Fund, the plaintiff had "adamantly" opposed bearing the burden of proof, in contrast to Liberty Mutual in which the plaintiff objected only in the aftermath of trial. Id. The Fireman's Fund court expressly distinguished Liberty Mutual: "Courts understandably balk at imposing the burden of proof on unsuspecting defendants after the plaintiff in a declaratory judgment action has voluntarily assumed the burden of proof and has given no prior notice of its claim that the defendant should bear the burden." Id. Under both Liberty Mutual and Fireman's Fund, the burden of proof was properly placed on Royal.

CONCLUSION

The court has carefully reconsidered its findings of facts and conclusions of law and declines to reverse its previous determinations regarding the issues placed before it and the burden of proof. Phoenix responded adequately to the allegations of non-coverage in Royal's complaint; that issue was properly before the court. And although the burden of proof might have been placed on Phoenix before the start of trial, Royal may not shift the burden after its conclusion. The motion for reconsideration is denied.

An appropriate order follows.

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ROYAL INSURANCE COMPANY OF AMERICA, INC.:

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	:	
PHOENIX PETROLEUM CO.	:	**No. 97-3349**

ORDER

AND NOW, this 22nd day of December, 1998, upon consideration of Plaintiff Royal Insurance Company's Motion for Reconsideration, Defendant's Response, and Plaintiff's Reply thereto, and in accordance with the attached Memorandum, it is hereby **ORDERED** that Plaintiff's Motion for Reconsideration is **DENIED**.

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J.